

1 BEFORE THE POLLUTION CONTROL HEARINGS BOARD
2 STATE OF WASHINGTON

3 BUCKLIN HILL NEIGHBORHOOD
4 ASSOCIATION,)

5 Appellant,)

6 v.)

7 STATE OF WASHINGTON, DEPARTMENT
8 OF ECOLOGY, and ISLAND
9 UTILITY COMPANY,)

10 Respondents.)

PCHB No. 88-177

FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW
AND ORDER

11 This matter, the appeal of a decision by the Washington State
12 Department of Ecology to approve a permit for the appropriation of
13 public groundwater on south Bainbridge Island for community domestic
14 supply, came on for hearing at Winslow, Washington, on March 29, 1989,
15 and Seattle, Washington, on March 30, 1989, before the Pollution
16 Control Hearings Board, Wick Dufford, Presiding, Judith A. Bendor and
17 Harold S. Zimmerman.
18

1 Appellant Bucklin Hill Neighborhood Association appeared by Andy
2 Stahl, association representative, and Corrie J. Yackulic, attorney at
3 law. The Department of Ecology was represented by Peter R. Anderson,
4 Assistant Attorney General. Thomas A. Goeltz, attorney at law,
5 appeared for Island Utility Company. The proceedings were reported by
6 Marlene Falk of Likkell and Associates, Everett.

7 Witnesses were sworn and testified. Exhibits were admitted and
8 examined. Argument was heard. From the testimony, evidence and
9 contentions of the parties the Board makes these

10 FINDINGS OF FACT

11 I

12 This case concerns the approval of an application to withdraw
13 water from two deep wells at an aggregate maximum rate of 300 gallons
14 per minute, limited to 336 acre feet per year, for community domestic
15 supply within the service area of the Island Utility Company on
16 Bainbridge Island, Kitsap County, Washington.

17 II

18 Island Utility is a limited partnership formed in 1987 to serve
19 an 1100 to 1200 acre area, comprising uplands surrounding Blakely
20 Harbor in the southeast part of Bainbridge Island. The great majority
21 of the land in the service area (about 1000 acres) is owned by Port
22 Blakely Tree Farm Limited Partnership. Island Utility and PBTF are
23 affiliated limited partnerships. The same person is the president of
24 both.

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III

PBTF is the successor to the Port Blakely Mill Company, a pioneer entity which opened a lumber mill on the island in the 1870's. The PBTF holdings are what remains of a much larger acreage which the mill company owned and used as its source for wood. The primary use of the PBTF property in the past has been for the raising and cutting of trees. Now the present management has determined that modern conditions making devoting the property to tree farming impractical. Thus, PBTF is exploring development possibilities. The formation of Island Utility and application for a permit to appropriate ground water are steps in this process.

IV

Bucklin Hill Neighborhood Association is a citizen's group concerned with the future development of south Bainbridge Island, consisting of residents and property owners in the area.

V

In the past, the entire south end of Bainbridge Island has been in short supply for water. Sources used have been from shallow dug wells, small ponds, and cisterns catching water off roofs. In many instances these sources have proven inadequate or unreliable.

At the time of hearing, seventeen homes along Seaborn Road on the north shore of Port Blakely Harbor within the Island Utility service all were being served by an antiquated system which diverted water

1 from a pond behind an earthen dam. Monitoring of water in this
2 system in recent years revealed high coliform counts and giardia is
3 thought to be present. This led to its inclusion on the county's
4 Trouble Water List - a listing of systems where building site
5 applications are disapproved owing to water supply problems. After
6 January 1987, residents on this system were either boiling their
7 drinking water or purchasing bottled water.^{1/}

8 Another small water system with at least ten connections to homes
9 south of Port Blakely Harbor draws its water from a spring which
10 produces only two to three gallons per minute - enough to reliably
11 meet requirements of three homes. Bacteriological analysis for this
12 system over the past ten years reveals numerous violations of maximum
13 contaminant levels established by health authorities. Several
14 additional platted lots in this area cannot be built upon until water
15 supply difficulties are resolved.

16 VI

17 The extreme south end of Bainbridge Island is characterized
18 geologically by high bedrock, an unpromising area for the development
19 of significant groundwater production. To the north of Port Blakely
20

21 ^{1/} Following the hearing herein, the facilities were completed for
22 service of these seventeen residences by the Island Utility system.
23 There being no dispute on the matter, the Board entered an Order on
24 Interim Service on April 28, 1989, allowing Island Utility to commence
25 service to these homes limited to their reasonable needs.

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1 Harbor, however, conditions are more favorable, and several deep wells
2 have been successfully developed, notably at the Wyckoff plant site on
3 Eagle Harbor and the Fletcher Bay well on the west side of the island.

4 Prior to the formation of Island Utility, PBTF attempted without
5 success to find a source of water for their property from an off-site
6 source. In the fall of 1987, drilling was initiated within the Island
7 Utility service area at a site north of the high bedrock zone on Old
8 Mill Road, roughly in between the Wyckoff and Fletcher Bay wells.

9 VII

10 Two wells were constructed at the Old Mill Road site, referred to
11 as OMR well #1 (deep) and OMR well #2 (shallow). OMR #1 was
12 ultimately drilled to a depth of 1100 feet and cased down to 958 feet
13 below land surface. A water bearing zone was encountered at depths
14 between 873 and 935 feet and the casing was slotted in this interval
15 to allow water to enter the well. The water was under pressure and
16 rose up the bore hole to a static level 106 feet below the top of the
17 well. Land surface at the site is estimated to be about 130 feet
18 above sea level.

19 OMR #2, was drilled about 50 feet away from OMR #1 to a depth of
20 160 feet, encountering a water zone at about 125 feet. Initial test
21 pumping of OMR #2 produced a measurable drawdown in a neighboring
22 shallow well.

VIII

On May 5, 1988, Island Utility filed the application which is the subject of the instant appeal. The application sought approval for the appropriation of 400 gallons per minute from two deep wells to be used continuously for community domestic supply within the Island Utility service area.

One of the wells identified is OMR #1. The other has yet to be drilled, the application contemplating that it would be constructed at some later time to accommodate system expansion.

Island Utility decided to not pursue use of the shallow well OMR #2, and an application for appropriation from that source was ultimately cancelled.

IX

At the request of the Department of Ecology, Island Utility provided information estimating population growth in its service area over a 25 year period. Extrapolating from projections made by government sources, Island Utility, derived an estimate of 60-75 new houses per year on average. Over 25 years this would equal 1500 to 1875 new residential services.

X

Ecology received numerous written protests of Island Utility's application and held two public meetings on Bainbridge Island concerning it. The application was supported by the Kitsap County Health Department.

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1 Ecology's investigation of the matter included charting and
2 analyzing existing water well logs within one and one-half miles of
3 OMR #1 (115 wells), reviewing of available technical literature on
4 Bainbridge Island groundwater, analyzing logs and pump test reports
5 prepared for OMR #1 and OMR #2, and searching and reviewing water
6 right files and Department of Social and Health Services files on
7 water use in the general area.

8 XI

9 On October 31, 1988, Ecology issued its Report of Examination on
10 the application, together with an Order approving the issuance of a
11 permit for the appropriation of public groundwater at a maximum rate
12 of 300 gallons per minute instantaneously, limited to an annual
13 quantity of 336 acre feet for community domestic supply.

14 This approval was appealed to this Board by appellant Bucklin
15 Hill Neighborhood Association on November 29, 1988.

16 XII

17 Ecology's approval called for the imposition of permit
18 conditions, including the following:

- 19 [1] Instantaneous withdrawal from OMR well #1 shall not exceed
20 150 gpm. After the second deep well is completed, total
21 instantaneous withdrawal from both wells will not exceed
22 300 gpm, subject to reduction following proof examination.
23 [2] Annual quantities withdrawn from both wells shall not
24 exceed 336 acre-feet subject to further reduction
25 following proof examination.

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- 1 [3] The second deep well when drilled will require an aquifer
2 test prior to productive use. The aquifer test shall be
3 under the supervision of a competent ground water
4 consultant and procedures shall conform with WRIS
5 Information Bulletin No. 30 (copy attached).
- 6 [4] All water wells constructed within the state shall meet
7 the minimum standards for construction and maintenance as
8 provided under RCW 18.104 (Washington Water Well
9 Construction Act of 1971) and Chapter 173-160 WAC (Minimum
10 Standards for Construction and Maintenance of Water Wells).
- 11 [5] Installation and maintenance of an access port as
12 described in Ground Water Bulletin No. 1 is required. An
13 air line and gauge may be installed in addition to the
14 access port.
- 15 [6] An approved measuring device shall be installed and
16 maintained in accordance with RCW 90.03.360, WAC
17 508-64-020 through WAC 508-64-040 (Installation, operation
18 and maintenance requirements attached hereto).
- 19 [7] Permittee or its successor(s) shall submit in writing to
20 the Department of Ecology, Northwest Regional Office,
21 Redmond, Washington, during the months of April and August
22 each year, the chloride concentration of the water pumped
23 and static water level (pump off) of the well authorized
24 by this permit. Depending on the results of this data
25 collection, the withdrawal of ground water under this
26 permit may be limited, or other appropriate action may be
27 required, by Department of Ecology order, to prevent
seawater intrusion into the subject aquifer.
- [8] Monitoring of static water level, pumping water level,
instantaneous discharge (gpm) and total quantities pumped
shall be done on OMR well #1 (deep) on a monthly basis.
This same monitoring shall be accomplished on the second
deep well when drilled. This data shall be sent to the
Department of Ecology within 30 days of collection.
- [9] OMR well #2 in the shallower aquifer, shall not be used as
a production point of withdrawal, but it shall be
maintained as a monitoring well. Permittee shall monitor
SWL in this well on a monthly basis and data shall be sent
to the Department of Ecology within 30 days of collection.

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1 [10] Nothing in the permit, when issued, shall be construed as
2 excusing the permittee from compliance with any applicable
3 federal, state, or local statutes, ordinances, or
4 regulations including those administered by state and
local agencies under Chapter 248-54 WAC, Public Water
Supplies and Chapter 248-56 WAC, Public Water System
Coordination Act.

5 [11] A certificate of water right will not be issued until a
6 final investigation is made.

7 XIII

8 Ecology's quantity limitations were made on the assumption that a
9 total instantaneous yield of 300 gallons per minute might be achieved
10 from two deep wells at the site. Of course, it is not anticipated
11 that this instantaneous rate would be used continuously. The 336 acre
12 feet annual limit would be reached by a continuous aggregate pumping
13 rate of only 208 gallons per minute. Thus, the annual quantity acts
14 as an additional limitation on withdrawals.

15 Ecology's quantitative allocation based on average consumption in
16 the area is 0.5 acre feet per service. Therefore, the system approved
17 would only have the potential for serving 600 to 700 services.

18 XIV

19 A 24-hour pump test was conducted at OMR #1 in April 1988, at 150
20 gallons per minute. During this period equilibrium was not reached,
21 but the drawdown curve supported a prediction that full stabilization
22 would be reached after 10 days of pumping continuously at that rate.
23 Recovery of the well after pumping was complete.

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1 A subsequent 168-hour pump test was conducted in May, 1989. This
2 test demonstrated that the well could be pumped continuously for 7
3 days at 112 gallons per minute and have a resulting drawdown of no
4 more than 94 feet. The results indicated either that at 112 gpm
5 equilibrium had been reached at the 94 foot drawdown, or, at worst,
6 that pumping for about two centuries at that rate would produce a
7 further drawdown of about 31 additional feet.^{2/}

8 We are convinced that recharge was occurring during the pumping of
9 OMR #1.

10 We note that water has been withdrawn from the deep Fletcher Bay
11 well for over 10 years and from the Wyckoff site for at least 50 years
12 without declines in water levels.

13 We find that water is available at the Island Utility site and
14 that the aquifer utilized can yield water within a reasonable pumping
15 lift. It was not demonstrated that water is not available in
16 quantities approved by Ecology.

17 XV

18 The producing wells within a mile and one-half of OMR #1 withdraw
19 from a relatively shallow aquifer zone. This zone is separated from
20 the deep zone from which Island Utility seeks to withdraw by a
21

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23 ^{2/} We include in our record both the report by Island Utility's
24 expert geohydrologist on this post-hearing test and the response,
25 thereto, by appellant's expert geohydrologist. We have considered
26 both submissions.

1 relatively impermeable layer of silt and clay. No evidence has shown
2 any effect from pumping OMR #1 (deep) on OMR #2 (shallow) although the
3 two are only 50 feet apart. We are not persuaded that pumping wells
4 in the deep zone will, more probably than not, relieve pressure and
5 cause downward leakage from the upper zone.

6 We find that the pumping of deep wells at the site in question is
7 unlikely to adversely affect water rights in wells in the shallow
8 aquifer.

9 Furthermore, given the distance from the Wyckoff (1.6 miles) and
10 Fletcher Bay (2.5 miles) wells, we find that pumping from deep wells
11 at the site in question is unlikely to adversely affect existing deep
12 zone users. Indeed, although quite possible, it has not been
13 demonstrated that all these deep wells tap a single interconnected
14 aquifer.

15 XVI

16 Presently available data does not indicate a problem with
17 seawater intrusion on Bainbridge Island. We are not persuaded that
18 any data developed to date demonstrate a likelihood that the Island
19 Utility groundwater development, as approved, will induce sea water
20 intrusion.

21 XVII

22 Ecology in its decision-making process made no determination of
23 nonsignificance and prepared no environmental impact statement (EIS)
24

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1 in relation to Island Utility's application. Ecology's position was
2 and is that this application is exempt from such State Environmental
3 Policy Act (SEPA) procedures, by virtue of WAC 197-11-800(4). That
4 subsection lists as a categorical exemption:

5 (4) Water rights. The following appropriations of
6 water shall be exempt, the exemption covering not only
7 the permit to appropriate water, but also any
8 hydraulics permit, shoreline permit or building permit
9 required for a normal diversion or intake structure,
10 well and pumphouse reasonably necessary to accomplish
11 the exempted appropriation, and including any
12 activities relating to construction of a distribution
13 system solely for any exempted appropriation:

(a) Appropriations of fifty cubic feet per second
or less of surface water for irrigation purposes, when
done without a government subsidy.

(b) Appropriations of one cubic foot per second
or less of surface water, or of 2,250 gallons per
minute or less of ground water, for any purpose.
(Emphasis added.)

14 XVIII

15 At the time of application for a ground water appropriation
16 permit, Island Utility and PBTF clearly had an idea of converting the
17 PBTF land holdings from forest to some sort of residential
18 development. However, beyond this generalized motion there were no
19 details.

20 The numbers on population growth submitted to Ecology represented
21 a mere calculation based on governmental statistical projections. The
22 figures were not part of any plan of action.
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1 We find that when the application was filed, Island Utility and
2 PBTF had made no firm plans about what to do with the water it might
3 be able by diligence to appropriate, other than to serve the existing
4 homes and platted lots in the two small and inadequate water systems
5 north and south of Port Blakely Harbor - a total of perhaps 32
6 services.

7 XIX

8 Prior to Ecology's Report of Examination and Order in this case,
9 PBTF and Island Utility had still made no decisions on the undeveloped
10 PBTF lands as to what kinds of densities of residential development to
11 pursue, where and how large open spaces should be, where commercial
12 property might be located, where housing might be built, where roads
13 might go, what sorts of additional infrastructure might be required.

14 A consultant prepared a drawing containing a configuration of his
15 own invention, created essentially on his own initiative. The drawing
16 did not represent even a concept plan upon which PBTF or Island
17 Utility had agreed or decided to advance as a proposal.

18 A number of marina ideas had been advanced but none had gotten
19 passed the discussion stage.

20 XX

21 After Ecology's decision, PBTF received a preliminary report on
22 the suitability of 160 acres of land for on-site wastewater disposal.
23 Not even this limited level of soils analysis had been performed for
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1 the more than 800 remaining acres in PBTF's ownership. Not even
2 tentative decisions had been made before Ecology's decision on the
3 type of sewage treatment to be selected or where any community
4 treatment facilities might be located

5 XXI

6 In the month before the hearing before this Board, Kitsap County
7 commenced a Bainbridge Island Subarea Plan update, as a part of its
8 ongoing land use planning effort. In response PBTF began to evaluate
9 development alternatives in order to be effectively involved in the
10 County's planning process. Nonetheless, at the time of hearing no
11 concrete plans had either been developed or presented to the County by
12 PBTF.

13 XXII

14 We find that the decision of Ecology appealed from was made
15 before the environmental effects of any action beyond the
16 appropriation itself could be meaningfully evaluated.

17 XXIII

18 It was not proven that the appropriation is a segment of a
19 proposal involving related actions, some exempt and some not, or all
20 exempt but together having a probable significant adverse
21 environmental impact.

22 Moreover, we are persuaded that the approval of the appropriation
23 under the circumstances was not action which limited the range of
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1 reasonable alternatives for use of PBTF's land.

2 XXIV

3 Any Conclusion of Law which is deemed a Finding of Fact is hereby
4 adopted as such.

5 From these Findings of Fact, the Board comes to these

6 CONCLUSIONS OF LAW

7 I

8 The Board has jurisdiction over these persons and these matters.

9 II

10 We conclude that the action of Ecology, approving this
11 groundwater appropriation with conditions, was categorically exempt
12 from the threshold determination and EIS requirements of SEPA, by
13 virtue of the water rights exemption of WAC 197-11-800(4), quoted
14 above.

15 Categorical exemptions are subject to limitations contained in
16 WAC 197-11-305. Under the facts, however, we conclude that those
17 limitations do not apply in this case to remove the exemption.

18 III

19 We note particularly that, before an action can fit within the
20 limitations on exemptions, the series of actions to which it is
21 related must be sufficiently in focus to constitute a "proposal". WAC
22 197-11-305.

23 By virtue of WAC 197-11-055 a threshold determination and
24 environmental impact statement, if required, are to be prepared at the
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1 point "when the principal features of a proposal and its environmental
2 impacts can be reasonably identified".

3 The definition of "proposal" in WAC 197-11-784 states:

4 A proposal exists at that stage in the development of an
5 action when an agency is presented with an application or
6 has a goal and is actively preparing to make a decision on
7 one or more alternative means of accomplishing the goal
and the environmental effects can be meaningfully
evaluated.

8 In the instant case, beyond the appropriation itself, there was
9 no "proposal" when Ecology ruled.

10 IV

11 We are, however, pleased that Island Utility stipulated that it
12 would participate with the lead agency in the preparation of an EIS as
13 soon as its land use plans became sufficiently concrete to permit
14 meaningful environmental review.

15 Under WAC 197-11-305, the exempt aspects of proposals may proceed
16 prior to environmental review if there is no adverse environmental
17 effect or limitation on the choice of reasonable alternatives. See
18 WAC 197-11-070. But, we are strongly persuaded that as soon as the
19 larger plans of PBTf reach the "proposal" stage, an EIS ought to be
20 written. The conversion of the tree farm to new uses will, we
21 believe, present the reasonable probability of a more than moderate
22 effect on the quality of the environment. See Norway Hill
23 Preservation and Protection Association v. King County Council, 87
24 Wn.2d 267, 552 P.2d 1674 (1976).

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V

We have reviewed the additional SEPA issues raised by appellant and conclude they are without merit.

VI

With the addition of one condition, we conclude that the action of Ecology, approving the groundwater appropriations with conditions, meets the requirements of the applicable water codes, specifically, RCW 90.03.290 as made applicable to groundwater applications by RCW 90.44.060. As stated in Stemple v. Department of Water Resources, 82 Wn.2d 109, 115, 508 P.2d 166 (1973):

The statute requires the department to make essentially four determinations prior to the issuance of a water use permit: (1) what water, if any, is available; (2) to what beneficial uses the water is to be applied; (3) will the appropriation impair existing rights; and (4) will the appropriation detrimentally affect the public welfare.

VII

The water availability criterion is given additional content in the groundwater context by RCW 90.44.070 which prohibits the granting of a permit for "withdrawal of public groundwaters beyond the capacity of the underground bed or formation . . . to yield such water within a reasonable or feasible pumping lift. . . ."

The drawdown characteristics of the well tested do not present a likelihood that this standard will be exceeded by the excessive mining of water (i.e., removal without recharge).

1 However, we conclude that the recent pump testing of the well,
2 dictates the addition of a proviso to the first condition set forth in
3 the Report of Examination. That condition should be amended to read:

4 Instantaneous withdrawal from OMR Well #1 shall not
5 exceed 150 gpm, provided that the average withdrawal rate
6 shall not exceed 112 gpm. After the second deep well is
7 completed, total instantaneous withdrawal from both wells
will not exceed 300 gpm, subject to reduction following
proof examination.

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VIII

Appellant has asserted that the beneficial use criterion cannot
be met until PBTF/Island Utility commits to develop its forest land
for residential use - in other words, that the water code cannot be
satisfied until the planning here is more precise. We disagree.

An appropriation permit is the state's permission to use public
waters for a purpose deemed "beneficial". Under RCW 90.54.020(1)
domestic use is explicitly identified as "beneficial". Thus, when a
permit is issued, Island Utility will have approval to make an
appropriation for an approved purpose. The water code requires that
the project be diligently pursued and a time schedule will be set
forth in the permit. RCW 90.03.320. But there is no requirement that
the project be engineered, layed out or planned before permission to
appropriate is granted.

Should Island Utility at some point desire to apply the water to
a different use, its permit as issued will provide no authority to do
so. Should it fail to appropriate water in the amount permitted, its

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1 perfected appropriation will be for the lesser amount. However, these
2 possibilities do not take the initially permitted domestic use
3 objective out of the definition of "beneficial".

4 IX

5 No impairment of existing rights can occur so long as the shallow
6 aquifer is unaffected and other existing deep wells are not interfered
7 with. The use of OMR #2 as a monitoring well should serve as an early
8 warning mechanism of affects on the shallow aquifer and permit timely
9 corrective action to protect senior appropriators.

10 X

11 The public welfare criterion does not open up water law to the
12 unintended task of wholesale replacement of land use management
13 regulations. The focus remains on the water resource impacts of an
14 appropriation decision.

15 Nonetheless, Stemple, supra makes clear that this criterion was
16 given additional specificity by the Water Resources Act of 1971
17 (Chapter 90.54 RCW). Thus, environmental effects, such as resultant
18 water pollution must be considered in granting appropriation permits.
19 See RCW 90.54.020(3)(b).

20 Sea water intrusion, were it to occur, would violate the public
21 welfare standard. Our findings do not support the likelihood of this
22 effect. But, again the monitoring conditions of the permit provide a
23 mechanism for detection and correction.

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XI

RCW 90.03.290 also imposes upon Ecology a duty to investigate the application in a manner sufficient to answer the four statutory criteria. We conclude that the investigation conducted in this case was unusually thorough and fully met the standard of the law.

XII

Any Finding of Fact which is deemed a Conclusion of Law is hereby adopted as such.

From these Conclusions, the Board enters this

ORDER

The Report of Examination and Order issued by the Department of Ecology to Island Utility Company on October 31, 1988, is affirmed, as modified in Conclusion of Law VII, above.

DONE this 10th day of Nov, 1989.

POLLUTION CONTROL HEARINGS BOARD



WICK DUFFORD, Chairman



JUDITH A. BENDOR, Member



HAROLD S. ZIMMERMAN, Member

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